



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Protective Plastics, Inc.

File: B-257659

Date: October 27, 1994

Roy Limpitlaw for the protester.

Kenneth A. Cormier for Cormier Textile Products, Inc., an interested party.

Gary M. Winter, Esq., Agency for International Development, for the agency.

David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency rejection of an offer on the basis that the offeror failed to commit itself to conduct required accelerated weathering tests was improper where the protester's offer makes clear that the offeror did agree to meet all test requirements by conducting in-house tests, as required by the solicitation.

DECISION

Protective Plastics, Inc. (PPI) protests the award under a request for proposals (RFP) issued on an emergency basis by the Agency for International Development (AID) for plastic sheeting for its international disaster assistance stockpile. The agency rejected PPI's offer on the basis that the offer did not commit PPI to conduct, as required by the RFP, accelerated weathering tests on the sheeting. PPI asserts that its offer did commit the firm to conduct the tests and that PPI, the lowest-priced offeror, should have received the award.

We sustain the protest.

The RFP, issued to three potential offerors on May 6, 1994, requested the submission of proposals by the close of business on May 10 for the supply of 3,353 rolls of plastic sheeting. Offers were to comply with an AID plastic sheeting specification, which had been developed after plastic sheeting samples submitted to the agency by these three firms had failed--in varying degrees--to comply with the agency's original specification. Among other things,

the specification required that the contractor "conduct sufficient in-house testing to insure that [the] product meets the specifications . . .," and provide the agency at logical intervals in the production process with samples, which AID could use, for independent testing.

All three firms solicited submitted offers. Subsequent to the evaluation of these offers, the agency held oral discussions with the offerors and requested them to submit best and final offers (BAFO) by May 13. PPI's initial offer stated that "in addition to our in-house measurements of the characteristics contained in the Technical and Testing Specifications, we intend to confirm these measurements with Independent Laboratory Tests except those calling for accelerated weathering." PPI also requested that the maximum unit weight of the sheeting as set forth in the specification be changed from 6.75 to 7.0 ounces per square yard, stating that "we take exception to no other portion of the specification." The agency viewed PPI's offer as taking exception to the RFP test requirement for accelerated weathering and so advised PPI during oral discussions. In response, PPI made no change in its BAFO to the portion of its offer dealing with testing; it did agree to meet the weight maximum. After receipt of BAFOs, PPI's lowest-priced offer was rejected because the agency determined that PPI had not agreed itself to conduct the required accelerated weathering tests. Award was made on June 3 to an offeror whose higher-priced offer was considered technically acceptable.

The agency believes that it properly evaluated PPI's offer as taking exception to the test requirements. It also states that its reading of PPI's offer is supported by a PPI letter of May 3, written after conversations between PPI and the agency concerning defects found in stockpiled sheeting supplied by PPI under a prior contract, in which PPI stated that it had agreed "to provide a Certificate of Conformance supported with either factory test lab reports or independent laboratory reports for all attributes described in Paragraph C.1 of the subject contract except tensile strength after accelerated weathering for each Delivery Order manufactured." Further, the agency states, during negotiations on that contract PPI had defended its decision not to provide independent laboratory testing for accelerated weathering.

The agency alternatively contends that PPI's offer is at best ambiguous concerning PPI's commitment to the requirement since PPI was advised during oral discussions that its offer took exception to the accelerated weathering test requirements, and PPI made no changes in its BAFO to correct the agency's interpretation of its initial offer.

PPI states that during oral discussions, the agency negotiator asked why PPI was not offering to have the accelerated weathering tests done by an independent laboratory. PPI explained that the accelerated weathering testing would require 4 weeks to complete and would delay delivery of the sheeting beyond the contract schedule. PPI states that it pointed out to the negotiator that any independent laboratory testing it offered to perform was in addition to the in-house testing that PPI would conduct in conformance with the specification testing requirements. According to PPI, the negotiator never indicated that a failure to submit the sheeting to an independent laboratory for the accelerated weathering tests would render PPI's offer unacceptable. Consequently, PPI states that there was no reason for PPI to have changed the portion of its initial proposal dealing with testing. PPI points out that the agency was aware that PPI's sheeting supplier had sufficient in-house means to conduct all of the required testing.

In our view, the agency's determination that PPI's offer took exception to the requirement for accelerated weathering tests was unreasonable and, consequently, the rejection of PPI's offer was improper. We think PPI's offer was clear and did not take exception to the testing requirement. In its initial offer, PPI promised to conduct all the in-house tests required to meet the terms of the solicitation and, "in addition" to the required in-house tests of "measurements . . . contained in the technical and testing specifications," offered to confirm the in-house results by having the tests, with the exception of the accelerated weathering test, duplicated by an independent laboratory. Since the solicitation simply required the contractor to "conduct sufficient in-house testing to insure that [the] product meets the specifications . . .," PPI's offer met the RFP terms.

PPI further made its intent clear in its initial proposal where it stated in connection with its request for the unit weight change, that it took no exception to "no other portion of the specification."

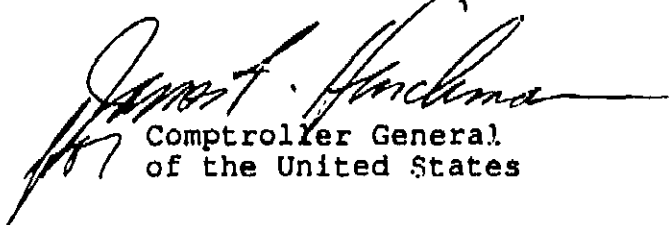
The agency argues that, because PPI allegedly was advised during oral discussions that this part of its offer was considered to have taken exception to the testing requirements and because it did not change that part of its offer, PPI's offer was ambiguous. PPI denies that it was told of AID's interpretation of its offer by the AID negotiator. Although accounts of the oral discussions conflict, based on the written proposal itself, we conclude that PPI submitted an unequivocal offer to provide the requisite supplies. Nothing on the face of PPI's offer limits, reduces, or modifies PPI's obligation to meet the

test requirements. See Haz-Tad, Inc.; Hazeltine Corp.; Tadiran, Ltd., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486.

The agency also relies on PPI's May 3 statement (quoted above) concerning laboratory tests for tensile strength (part of the accelerated weathering tests) made in connection with an earlier procurement. We believe that the quoted statement is itself ambiguous, and in any event, had nothing to do with the current procurement. It could not modify or contradict a promise in PPI's offer to conduct tests in accordance with the current solicitation requirements. We further note that in the same letter, PPI states that its supplier's factory has a "well-equipped test laboratory capable of thickness, weight, tear, tensile testing as well as accelerated weathering equipment," which indicates its capability to meet the testing requirements under the protested RFP.

As explained above, PPI's offer was improperly rejected. The agency awarded the contract on June 3, 1994. However, since PPI's protest was not filed within 10 calendar days of the award, the agency was not required to suspend performance of the contract, see 31 U.S.C. § 3553(d)(1) (1988). The agency has advised that contract performance has progressed to such a point that it is not feasible to terminate the contract. We, therefore, find the protester entitled to its costs of preparing its offer and its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). The protester should submit its detailed and certified claim for such costs directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f).

The protest is sustained.


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